No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1955

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 25–26) and the *per curiam* opinion on petition for rehearing (R. 27–28) are respectively reported at 222 F. 2d 820 and 224 F. 2d 957. The District Court's findings of fact and conclusions of law (R. 15–18) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 26), and a petition for rehearing was denied on August 4, 1955 (R. 27–28). The petition for a writ of certiorari was

filed on November 2, 1955, and was granted on January 9, 1956 (R. 28). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a regulation is valid under the Immigration and Nationality Act of 1952 in providing, with respect to an application for the discretionary relief of suspension of deportation, that the determination may be predicated upon undisclosed confidential information if the disclosure of the information, in the opinion of the hearing officer or the Board of Immigration Appeals, "would be prejudicial to the public interest, safety, or security".

2. Whether compliance with the applicable regulations was sufficiently evidenced in the instant case.

STATUTE AND REGULATIONS INVOLVED

1. The statutory provisions governing petitioner's application for suspension of deportation are Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214–216, 8 U. S. C. 1254 (a) (5) and 1254 (c). In pertinent part, they are set forth in Appendix A, *infra*, at pp. 56–57. Both sections provide that "the Attorney General *may, in his discretion,* suspend deportation"[1] under certain

[1] Emphasis added. The punctuation is that in Section 244 (a) (5).

specified circumstances. The provisions of Section 244 (d) of the Act, 66 Stat. at 216, 8 U. S. C. 1254 (d), are set forth in Appendix A, *infra,* at p. 58.

2. The regulation, the validity of which petitioner has challenged, is 8 C. F. R. (1952 ed.) 244.3, promulgated December 17, 1952, 17 F. R. 11517. It provides:

> § 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

Other relevant regulations are 8 C. F. R. (1952 ed.) 242.53 (c), 242.54 (d) and 242.61 (a), also promulgated December 17, 1952, 17 F. R. 11514, 11515. The pertinent provisions of these regulations are set forth in Appendix B, *infra,* at pp. 59–61.

STATEMENT

The instant habeas corpus proceeding was brought by petitioner in the United States District Court for the Western District of Washington to challenge the validity of the denial of his application for discretionary suspension of deportation under Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (R. 3–9). Petitioner's deportation had been ordered under the Act of October 16, 1918, as amended, 64 Stat. 987, 1006, 8 U. S. C. (1946 ed., Supp. V) 137, as an alien who, by his own admission, had been a voluntary member of the Communist Party between 1935 and 1940 (R. 47). The order of deportation had been appealed to, and sustained by, the Board of Immigration Appeals, and its validity is no longer challenged.[2]

The special inquiry officer of the Immigration and Naturalization Service, in the proceedings for the discretionary relief of suspension of deportation (at which petitioner was duly attended by counsel (R. 29)), found that on the record petitioner met the minimum statutory prerequisites for the relief,[3] but stated (R. 48):

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[2] The return to the writ of habeas corpus stated (R. 12) that a prior application for a writ of habeas corpus was made prior to the application for suspension of deportation, and that its denial by the District Court was not appealed.

[3] *I. e.*, lapse of 10 years since the abandonment of the communist status constituting the ground for deportation; physical presence in the United States for not less than 10 years; absence of a criminal record; moral character; and hardship in the event of deportation (R. 47–48).

> * * * However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied.

Upon appeal to the Board of Immigration Appeals with respect to the denial of discretionary relief, the Board held (R. 50–51):

> Suspension of deportation is not a matter of right on the part of the alien, but an act of grace on the part of the Attorney General and even without the authority of regulations, resort might be had to confidential information as a basis for denial of discretionary authority. [Citing *United States ex rel. Matranga v. Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967.]
>
> * * * There is no requirement on the part of the special inquiry officer that he specifically find that in his opinion the disclosure of the confidential information would be prejudicial to the public interest, safety, or security, as long as he finds that in point of fact such is the situation.
>
> Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief.

In his petition for habeas corpus,[4] petitioner alleged, upon "information and belief", that the confidential information consisted of a list circulated among employees in the Immigration Service naming petitioner as among the persons for whom support had been solicited by an organization that the Attorney General had listed as subversive (R. 7), and that because of this list his case for discretionary relief was prejudged (R. 7-8). He also contended that the list was not information the disclosure of which would be prejudicial to the public interest, safety or security, and that the special inquiry officer was not of the opinion that there would be prejudice in such disclosure "nor did he so find or state" (R. 8). He further complained generally against having the decision based upon information outside the record (R. 8).

The government, in its return in the habeas corpus proceeding, denied that the confidential information was of the character or substance asserted by petitioner, and denied prejudgment of petitioner's case (R. 14). The District Court heard testimony and found, *inter alia* (R. 15, 17):

> That the special inquiry officer and the Board of Immigration Appeals, acting for

[4] In the petition, petitioner contended that the basic deportation proceedings were "null and void" because petitioner at "no time violated any condition imposed at the time of his entry" (R. 5). The court below rejected this contention, upon authority of *Galvan* v. *Press*, 347 U. S. 522 (R. 25), and that argument is not presented in the petition for certiorari.

> the Attorney General, exercised their independent judgment in denying discretionary relief. * * *

The Court concluded (R. 17–18):

> The Attorney General, under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952 (8 USCA 1254 (a) (5)), or his authorized agent, may, * * * to determine eligibility for suspension of deportation, in the absence of a statutory direction or regulations to the contrary, consider confidential information outside the record in formulating his discretionary decision.
>
> * * * [T]he purpose of the regulation is to indicate that confidential information which would be prejudicial to the public interest, safety, or security need not be disclosed. A special finding that such information would be prejudicial to the public interest, safety, or security is not required by the regulation.

The Court of Appeals affirmed *per curiam*, holding that the special inquiry officer had "recit[ed] that the denial was on the basis of confidential information relating to the appellant, disclosure of which, in the opinion of the officer, would be prejudicial to the public interest. This ruling of the officer was expressly authorized by C. F. R. Title 8, § 244.3."

Upon petition for rehearing, challenging the court's paraphrasing of the officer's recital, the

Court of Appeals quoted the officer's language, and stated (R. 28):

> * * *. We think that this is a statement to the effect that the hearing officer was considering the confidential information under the circumstances, upon the conditions, and in the manner provided by the regulation. He considered it "as is provided for" under the regulation.
>
> * * * Here it is apparent that the officer complied with the regulation as a matter of substance. We agree with the trial court that the regulations require no special finding in any particular words or language. * * *

The court further rejected petitioner's general objection to reliance upon confidential information, and cited *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967.

SUMMARY OF ARGUMENT

I

The basic issue in this case is whether, under the Immigration and Nationality Act of 1952, the discretionary relief of suspension of deportation may be validly denied on the basis of confidential information where disclosure "would be prejudicial to the public interest, safety, or security". It is the government's position that, in view of the nature of the relief, the congressional purposes manifested in the statute, and the legisla-

tive history of the provisions relating to suspension, the regulation which permits the discretionary decision to be based upon such undisclosed confidential information is valid.

A. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (App. A, *infra*, pp. 56–57) vest in the Attorney General a broad discretionary power, as a matter of grace or clemency, to suspend the deportation of aliens who meet certain minimum requirements of eligibility. The statute contains no language requiring the Attorney General to hold hearings or to make findings in suspension cases, stating only that the Attorney General "may" act, "in his discretion". This power is as broad, and may be exercised in the same manner, as a judge's in suspending sentence or a chief executive's in commuting a sentence or pardoning an offense.

These broad statutory purposes have been recognized and confirmed by applicable decisions of this Court and of the courts of appeals.

B. When Congress vested in the Attorney General discretion to suspend deportation as an act of grace or clemency, and not as a matter of right, it manifested a purpose that the power should be exercised in as broad a fashion as the closely analogous discretionary powers relating to judicial sentencing and executive clemency. Since such powers are frequently exercised, in the sole discretion of the dispensing authority, on the

basis of non-record confidential information, there is an unusually strong implication that Congress has similarly authorized the Attorney General to act on the basis of such information.

Frequently, the exercise of the suspension power involves matters of international policy and security which might be seriously prejudiced if a full hearing were required in every case. Thus Congress had very strong reasons for not requiring a hearing or limiting the information on which this discretion was to be exercised. It would do clear violence to the plain congressional purpose to read Section 244 of the 1952 Act (App. A., *infra*, pp. 56–58) as an affirmative mandate that clemency must be granted in every case unless the government feels free to make public the confidential information or reasons which motivate a refusal to grant the requested relief.

Substantial judicial authority upholds the foregoing conclusions, even though the prior legislation was less emphatic in its bestowal of discretionary power than the instant provision and the regulations less explicit in permitting use of confidential information. *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967. This Court has held that, where the sentencing or pardoning power is involved, non-record information may

be used (*Williams* v. *New York*, 337 U. S. 241), that where the relief sought is not of right, security considerations may justify the absence of disclosure (*Shaughnessy* v. *Mezei*, 345 U. S. 206), and that political judgments may be based on confidential executive information (*Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103).

C. The legislative history also confirms the congressional purpose and understanding that what is here involved is an exceptional extending of clemency, analogous to executive pardon. In discussing the first suspension statute in 1940, which used only the word "may", the legislators employed the words "clemency", "leniency", and "amnesty". In the later 1952 enactment the emphatic words "in his discretion" were added. Possible use of confidential information was contemplated under both statutes.

D. Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3) does not authorize the use of confidential information in making determinations as to the applicant's statutory eligibility for relief. It permits the use of such information only in determining whether discretion should be exercised, and even then only when disclosure "would be prejudicial to the public interest, safety, or security". These limitations lend further support

to the reasonableness and validity of this regulation, which fully accords with the policy and purposes disclosed by the statute on its face and by its legislative history.

II

Petitioner alternatively urges that the regulations call for a partial disclosure of such confidential information, either through a "fair résumé" or through a "discuss[ion of] the nature of the derogatory accusations and [a] recit[ation of] how and why such information has affected [the hearing officer's] judgment". This additional contention is directly refuted by the wording and context of the applicable regulations, the controlling language of which is that the exercise of discretion "may be predicated upon confidential information *without the disclosure thereof to the applicant*" (emphasis added). 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3).

The regulations governing the determination of petitioner's application for suspension of deportation were all promulgated at the same time and must be read in context. They draw an important distinction between determinations of matters of statutory eligibility and determinations of clemency once eligibility is established. That the Attorney General has in the regulations

prescribed a hearing for certain aspects of suspension proceedings does not give rise to any inconsistency, since the same regulations make specific provision for the limited use of confidential information. These regulations nowhere provide on their face for the partial disclosure of the confidential information. The requirement for such partial disclosure, which petitioner seeks to read into them by implication, is directly rebutted by the unambiguous language of Section 244.3. The record in the instant case shows that the hearing officer and the Board of Immigration Appeals properly complied with all applicable regulations.

ARGUMENT

In the case at bar, petitioner does not challenge or question the validity or fairness of the proceedings in which he was found deportable as an alien who by his own admission had been a voluntary member of the Communist Party between 1935 and 1940. He now challenges only the subsequent refusal to grant his application for suspension of deportation made pursuant to Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (App. A, *infra*, pp. 56–57). Under these sections the Attorney General "may, in his discretion,"[5] as a matter of

[5] Punctuation is that in Section 244 (a) (5).

grace or clemency, suspend deportation of an alien meeting certain statutory requirements. While petitioner was found to meet the minimum requisites for statutory eligibility (R. 48) he was denied this discretionary relief on the basis of confidential information which had been considered pursuant to Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3) (R. 48, 51).[6]

The main thrust of petitioner's attack is directed at the alleged invalidity of the regulation under which the confidential information was used (Pet. Br. 8–22; see Am. Cur. Br. 6–21).[7] In substance, he argues that, since Congress has not affirmatively specified the procedure to be followed in considering suspension applications, the scope of the Attorney General's discretion should be narrowly limited (Pet. Br. 8–22; see Am. Cur. Br. 14–21), so that such applications must be granted in every case in which the government decides it is not free to make public the reason for an adverse decision. Petitioner's attack on the validity of the regulation is unsound and

[6] This regulation provides that "the determination as to whether the application for * * * suspension of deportation shall be granted or denied * * * may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security".

[7] References to petitioner's brief are indicated by "Pet. Br.". References to the *amicus curiae* brief of the American Jewish Congress are indicated by "Am. Cur. Br.".

without merit, since, as shown in Point I (*infra*, pp. 13–50), it runs squarely counter to the language and manifested purposes of Section 244 and its legislative history.

Alternatively, petitioner argues that, even if this regulation is valid, there was a failure to comply with certain implied requirements which he reads into the regulations, claiming that they call for either a "fair résumé" of the confidential information, or a discussion of its nature and the manner in which it affected the hearing officer's decision (Pet. Br. 7, incorporating Am. Cur. Br. 21–29). This alternative is likewise unsound, since, as shown in Point II (*infra*, pp. 50–55), the regulations on their face rebut petitioner's contentions, and were in all respects properly complied with.

I. THE DISCRETIONARY RELIEF OF SUSPENSION OF DEPORTATION IS A MATTER OF GRACE AND CLEMENCY, AND MAY BE VALIDLY DENIED ON THE BASIS OF CONFIDENTIAL INFORMATION

A. THE STATUTE MAKES SUSPENSION OF DEPORTATION AN ACT OF CLEMENCY, WHICH MAY BE GRANTED OR DENIED IN THE DISCRETION OF THE ATTORNEY GENERAL

1. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1942 (App. A, *infra*, pp. 56–57) provide that the Attorney General "may, in his discretion," temporarily suspend the deportation of a deportable alien meeting certain specified minimum requirements of

moral character, hardship, and residence within the United States. If deportation is suspended, the Attorney General must then report the case in detail to Congress. If Congress, within a specified time, affirmatively approves the Attorney General's action by a concurrent resolution, the deportation is cancelled.[8] If Congress fails to act, the Attorney General is required to deport.

Nowhere in the legislation is there language "requir[ing] the Attorney General to hold hearings or make findings in suspension cases".[9] Nor is there any language restricting the basis of the information upon which, or the procedure by which, the discretion is to be exercised. The statute provides only that the Attorney General "may" act, "in his discretion". Not content with the implications of discretion arising from the mere use of the word "may" (see *infra*, p. 18, fn. 14), Congress made its purpose unmistakably clear in both subdivisions (a) and (c) of Section 244 by

[8] A similar procedure applies to cases arising under Sections 244 (a) (4) and 244 (c). Under Sections 244 (a) (1), (2) or (3) and 244 (b), relating to other classes of aliens, the administrative action suspending deportation becomes final when Congress does not take affirmative action to the contrary. However, the statute makes no provision for congressional review in any case in which suspension is denied. Of course, Congress is not thereby precluded from enacting a special act for the alien's benefit, even though it was obviously hoped that the statutory procedure would substantially reduce the direct requests for such legislation.

[9] See *Shaughnessy* v. *Accardi*, 349 U. S. 280, 285 (dissenting opinion of Mr. Justice Black).

coupling "may" with the explanatory words "in his discretion".

This broad language is in sharp contrast with Section 242 (b), dealing with the procedure for making the basic determination of deportability. This latter section bristles at every point with the mandatory word "shall", and specifically commands that the determination of the basic question be made "only upon a record made in a proceeding before a special inquiry officer", and "upon reasonable, substantial, and probative evidence".[10]

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[10] Sec. 242 (b), 8 U. S. C. 1252 (b) provides, in pertinent part (emphasis added):

> A special inquiry officer *shall* conduct proceedings under this section to determine the deportability of any alien, and *shall* administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, *shall* make determinations, including orders of deportation. Determination of deportability in any case *shall* be made only upon a record made in a proceeding before a special inquiry officer, at which the alien *shall* have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General *shall* prescribe necessary and proper safeguards for the rights and privileges of such alien. * * * No special inquiry officer *shall* conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section *shall* be in accordance with such regulations, not inconsistent with this Act, as the Attor-

This contrast is well within the reminder of Mr. Justice Cardozo that, in construing a statute, reference should be made to "the aid to be derived from the wording of related sections".[11] Congress was plainly discriminating in this legislation between a determination of deportability on the basis of a record, and a recommendation of clemency following a finding of deportability. It is

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ney General *shall* prescribe. Such regulations *shall* include requirements that—

(1) the alien *shall* be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien *shall* have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien *shall* have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability *shall* be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed *shall* be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

[11] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. See also (at p. 316) in the same decision: "There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention. The need is not perceived of filling up the outlines because what is within them is assumed or carelessly overlooked. Not so in this case where Congress had its attention sharply directed to the fact that plain speech was needed if a hearing was to mean so much."

the same type of contrast found between the fixed, precise procedure required in determinations of criminal guilt, and the complete procedural leeway allowed in determining sentence after conviction, or executive clemency after sentence (*infra*, pp. 27–28).

An application for suspension of deportation does not call for a determination of a right to which the applicant is automatically entitled once certain facts are established. Rather, after the alien has been accorded a full hearing on the issue of deportability, he is given a further opportunity to request that a discretionary exception shall be made in his particular case. Under the statute, this is a matter of grace or clemency in the nature of a pardon.[12] In the determination of deportability, the statute specifically provides for a decision based on evidence openly adduced at a formal hearing. However, for the exercise of discretion in suspending deportation, just as in suspending or commuting a sentence, or granting a pardon, the statute leaves the widest leeway to the administrator.[13]

[12] As stated by Judge Learned Hand in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2): "The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

[13] It should be noted that, in the realm of legislation outside the Immigration and Nationality Act, Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009, enacted in solicitude for procedural rights, neverthe-

2. The unusually broad scope of the discretionary power which Congress has conferred upon the Attorney General in connection with granting or denying suspension of deportation has been recognized by this Court and by a number of lower federal courts in a series of decisions construing the predecessor suspension statute.[14] These decisions (*infra*, pp. 18–23) uniformly recognize that a refusal to grant suspension of deportation to an alien who establishes his statutory eligibility is not subject to judicial review except for failure to exercise any discretion or for abuse of discretion apparent from the grounds expressed in the administrative ruling itself.

In *Accardi* v. *Shaughnessy*, 347 U. S. 260, arising under the predecessor statute, although this Court held that Accardi was entitled to offer proof of pre-judgment (i. e. failure to exercise

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less makes a substantial exception in its application when "agency action is by law committed to agency discretion."

[14] Congress first provided for suspension of deportation in 1940 by adding a new provision, Section 19 (c), to the Immigration Act of 1917, 39 Stat. 874, as added, 54 Stat. 672, and amended, 62 Stat. 1206, 8 U. S. C. (1946 ed. Supp. V) 155 (c). Section 19 (c) provided that "the Attorney General may . . . suspend deportation", while the 1952 Act adds to the word "may" the further words "in his discretion" (see *supra*, pp. 14–15). Also, the regulations applicable to the instant case make specific the provision that the exercise of discretion "may be predicated upon confidential information", whereas the prior regulations did not.

any discretion)[15] the opinion contains this significant *caveat* (347 U. S. at 268, italics in original):

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

As regards the non-reviewability of the *manner* of exercising discretion, there was clear agreement and, indeed, further emphasis by Mr. Justice Jackson (with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Minton joined) dissenting on the ground that habeas corpus would not lie (347 U. S. at 269):

> Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence * * *.

The lower courts have also noted the discretionary nature of the relief and concluded that the courts cannot review the discretion of the

[15] Such pre[illegible]dgment was ultimately found not to have been established. *Shaughnessy* v. *Accardi*, 349 U. S. 280.

Attorney General as regards the types of evidence which he chooses to rely upon. A repeatedly cited decision to this effect was written in 1950 by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); with respect to the earlier counterpart of the instant legislation. Speaking for a unanimous panel, Judge Hand stated (180 F. 2d at 490–491):

> * * * True, without an inquiry we cannot know whether membership in the "[International Workers] Order" is prejudicial; for we cannot tell whether the Attorney General had adequate grounds for "proscribing" it. On the other hand we cannot say that he did not; and, *if* the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. *An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the "exercise of discretion," which we have again and again declared that we will not review.* [Citing cases.]
>
> Nor has the relator any constitutional right to demand that we should. As we have said, any "legally protected interest" he ever had has been forfeited by "due process of law"; forfeited as completely as a conviction of crime forfeits the liberty of the accused, be he citizen or alien. *The power of the Attorney General to suspend deportation is a dispensing power,*

> *like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace* over which courts have no review, unless * * * it *affirmatively* appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. * * * [Emphasis added.]

In *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2), the complaint was as to the type of evidence relied upon, not that it was confidential but that it consisted of a finding by an immigration inspector in an earlier hearing. The alien claimed the right to test the finding in a hearing. The court held (183 F. 2d 371, 372):

> The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion.

Moreover, the court held that the statutory condition of five years of good moral character preliminary to application for suspension did not preclude reliance by the Board of Immigration Appeals upon the alien's earlier bad character (183 F. 2d at 372–373), thus indicating that the statutory conditions of character, residence, and hardship were not the only proper criteria for the exercise of the broad unrestricted discretion conferred by the statute.[16]

[16] See also *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 373 (C. A. 2), certiorari denied, 333 U. S. 876, in which suspension of deporation was denied upon the

The Court of Appeals for the District of Columbia Circuit, in *Caddeo* v. *McGranery*, 202 F. 2d 807, under Section 19 (c) of the earlier Immigration Act (see fn. 14, *supra*, p. 18) sustained a denial of suspension of deportation in the face of allegations that the alien possessed the statutory residence requirements, and good moral character, concluding that only actual failure to exercise discretion or manifest abuse of discretion would afford a basis for judicial intervention. In the same circuit, the Court of Appeals in three decisions handed down on February 2, 1956, emphatically upheld the broad discretionary aspects of the power under the prior

basis of a state court conviction of incest (although alleged to have been unconstitutionally arrived at, and not *res judicata* in the deportation proceedings): *United States ex rel. Walther* v. *District Director of Immigration and Naturalization*, 175 F. 2d 693 (C. A. 2), in which the court (L. Hand, Clark, and Frank, JJ.) considered that the word "may" in the then statute (8 U. S. C. (1946 ed.) 155 (c)) "confers discretionary unreviewable power" (p. 694), although in that case the alien's only offense was illegal entry some ten years before, and he had a wife and two children, all born in the United States and dependent entirely on him for support, and had served in the United States Navy in World War II: *Sheddens* v. *Shaughnessy*, 177 F. 2d 363, 364 (C. A. 2), in which suspension of deportation was denied one who entered without visa, despite a citizen child born half a year after entry; cf. *United States ex rel. Ickowicz* v. *Day*, 18 F. 2d 962 (C. A. 2), in which a rehearing was denied of a request to be permitted to remain in the United States, although the district judge and the United States attorney had recommended granting the application to remain as being deserving.

and the present statute. *Asikese* v. *Brownell*, 230 F. 2d 34; *Melachrinos* v. *Brownell*, 230 F. 2d 42; and *Vichos* v. *Brownell*, 230 F. 2d 45.[17]

The policy of the statute and the decisions of this Court and of the courts of appeals afford compelling confirmation of what is apparent in the statute and regulations themselves—namely that what is here involved is a broad administrative discretion, relating to an act of clemency in the nature of a conditional pardon.

B. THE STATUTE MANIFESTS A PURPOSE TO GIVE THE ATTORNEY GENERAL DISCRETION TO USE CONFIDENTIAL INFORMATION IN DECIDING APPLICATIONS FOR SUSPENSION

1. When Congress, in Sections 244 (a) (5) and 244 (c),[18] vested in the Attorney General an unfettered discretion to grant or deny suspension of deportation as an act of grace or clemency, and not as a matter of right (*supra*, pp. 13–23), it strongly manifested a purpose that the power should be exercised in a similar fashion to the closely analogous discretionary powers relating

[17] In the Third Circuit, the government's view of the strong general effect of the word "discretion" is supported in the analogous decision of *Arakas* v. *Zimmerman*, 200 F. 2d 322, in which an alien sought to attack the refusal of the Board of Immigration Appeals to reopen a deportation proceeding for consideration of suspension of deportation. The Court of Appeals held that no hearing was required upon such a motion, it appearing that the Board had exercised its discretion in accord with the regulation.

[18] Sections 244 (a) (1) (2) (3) and (4) and 244 (b) in this respect disclose a similar policy.

to judicial sentencing and executive clemency. Since these powers may properly be, and frequently are, exercised in the sole discretion of the dispensing authority, on the basis of non-record confidential information, there is an unusually strong implication that Congress was similarly authorizing the Attorney General to be free to utilize such information. This implication becomes even stronger in view of the elements of international policy and security which might be seriously prejudiced if suspension were to be made a matter of right or if a full hearing were to be required irrespective of the circumstances of the particular case.

For example, subsection (d) of Section 244 (App. A, *infra*, p. 58) requires that, upon the cancellation of deportation of an alien, any quota to which the alien is chargeable must be reduced. The Senate Committee report accompanying the 1952 Act (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 25) recognized that law abiding aliens who await their turn abroad, on the quota waiting list, normally have a very strong prior claim to become permanent residents of this country over aliens, who illegally have gained admission or overstayed a lawful entry without compliance with the established quota procedure. The Act "accordingly establishes a policy that the administrative remedy [of suspension of deportation] should be available only in the very limited category of cases in which the deportation of the

alien would be unconscionable" (*ibid.*). Thus, the administrative recommendation to Congress may necessitate a balancing of the benefit for the specific alien as against its adverse effect on quotas, thereby necessarily taking into account considerations of international relations which cannot at all times be made a matter of record.

Wholly apart from its possible effect on quotas and international relations, Congress obviously recognized that decisions regarding suspension might also involve substantial security considerations. For instance, an alien who has been found deportable and who applies for suspension may be known through confidential sources to be actively engaged in subversion or, more directly, to be an espionage agent for a foreign country. The mere revelation that the government has such knowledge may in itself be damaging, at the very least, in informing the subversive organization or foreign nation that there is a leak in its own secrecy pattern, and probably also in revealing indirectly or by processes of elimination the source of the information. An alien, seeking discretionary relief from conduct which has been found to subject him to deportation, should not be able, by his act in applying for executive and congressional clemency, to impose upon the government the alternative of disclosing such sources of information, or allowing the deportable alien to remain permanently in the United States.

In short, both the language and the purpose of Section 244 of the Act indicate that Congress had strong reasons for not requiring a hearing or limiting the information on which this discretion was to be exercised. It would do clear violence to the manifested congressional purpose to read that section as an affirmative mandate that the clemency *must* be granted in every case, unless the government feels free to make public the reasons for not granting the requested relief. Thus it follows, from the nature of the power and of the discretion conferred by the statute, that the Attorney General may properly use confidential information in its exercise.

2. The Second Circuit expressly so held in *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160, certiorari denied, 347 U. S. 967, even when the regulations did not provide specifically for the use of confidential information. Relying *inter alia* upon the *Kaloudis* and *Adel* decisions (discussed *supra*, pp. 20–21), the court held (210 F. 2d at 161):

> We do not understand appellant to base his contention on the use of confidential information in the administrative determination of his deportability or of his eligibility for suspension of deportation. In any event, the record does not show the use of confidential information in the determination of these issues. Since it was used only for its bearing on the formula-

> tion of a discretionary decision, our precedents bar relief. [Citing decisions.] * * * The Attorney General, in making a discretionary determination, may consider confidential information; there is nothing to the contrary in the Regulations.

In this holding, the Court of Appeals was following principles enunciated by this Court in similar situations involving discretionary judgments.

Thus, Mr. Justice Black, speaking for this Court in *Williams* v. *New York*, 337 U. S. 241, in a murder case in which the jury recommended life imprisonment but the trial judge, in his discretion, increased the penalty to death "after considering information as to [defendant's] previous criminal record without permitting him to confront or cross-examine the witnesses" (337 U. S. at 241), stated (at 247, 251):

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an

opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

* * * * *

Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.

Serious as deportation is, the judgment as to whether to suspend deportation is not more serious than the choice between life and death. In the exercise of the power to suspend deportation, the officials in whom discretion is vested should be as free as a judge in imposing sentence to consider matters which it is contrary to some established policy to reveal.

A comparable indication of the basic congressional approach appears in Section 241 (b) of the Act. This section provides that a crime for which the alien is pardoned, or as to which a judge so recommends, is not to be ground for deportation.[19] In granting or denying a pardon effective to prevent deportation, the President or a governor would not be precluded, by provisions of this section, from using or acting on the basis of undisclosed confidential information. Similarly, the sentencing judge in making or refusing to make a conclusive recommendation against deportation is left wholly free to utilize such confidential information, irrespective of the express provision allowing representations against the granting of such relief to be made by the prosecuting authorities. Accordingly, Congress has indicated that it had no basic objection to fully discretionary action within the area of clemency.

[19] Section 241 (b), 66 Stat. 208, 8 U. S. C. 1251 (b), provides: "The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter."

This Court has recognized that considerations of security may themselves justify the use of confidential information under circumstances substantially more doubtful than in the instant case. In *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, 345 U. S. 206, aliens, who had met every congressionally established qualification for admission to this country, were nevertheless held to have been properly excluded following an administrative determination, based on undisclosed confidential information, that their entry would be "prejudicial to the interests of the United States" (338 U. S. at 541; 345 U. S. at 211). Thus *Knauff* and *Mezei* did not involve any act of clemency or special dispensation of the kind here involved, which, as we have already emphasized (*supra*, pp. 27–29), is customarily exercised in the unfettered discretion of the dispensing authority, and frequently on the basis of undisclosed confidential information.

Furthermore, this petitioner's statutory right to be in the United States has long since been terminated by full deportation proceedings in which he has been fully accorded all constitutional due process requirements. Petitioner has no more statutory "right" to be permitted to remain in the United States[20] than either Mezei, who had

[20] The decision in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, and the discusion therein of the *Knauff* case, *supra*, does not affect the pertinence of the *Mezei* case. In *Kwong Hai Chew*, upon return of a resident alien from service as a

spent a long period of years in the United States (345 U. S. at 208), or Ellen Knauff, who was the wife of a United States citizen (338 U. S. at 549, 550–551), had any statutory "right" to enter. All had to be dealt with under statutes which granted to the executive certain broad powers, but which did not spell out the manner in which these powers were to be exercised. In each case, the authority to act upon confidential informatiton was only affirmatively spelled out, as here, in the implementing regulations (see 345 U. S. at 211–213, fn. 7 and 8). In view of the clemency nature of the power here involved; the instant regulation (*supra*, p. 3) is more clearly within the statutory purview than the earlier one, the validity of which was sustained in *Knauff* and *Mezei*.

As this Court held, in the *Mezei* case (345 U. S. at 210–211):

> Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. [Citing decisions.] In the exercise of these powers, Congress expressly authorized the

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seaman on a vessel of United States registry, it was sought to exclude him without notice or hearing. His right to be in the United States had never before been challenged, and had, indeed, been established by special act of Congress, and he had not, as in the instant case, had full procedural process and had not yet been properly found without right to be within the United States (344 U. S. at 592–593).

> President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency. Under it, the Attorney General, acting for the President, may shut out aliens whose "entry would be prejudicial to the interests of the United States." And he may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest. * * *

Moreover, as already noted (*supra*, pp. 24–25), the judgment as to whether to suspend deportation as to one alien may affect more than the individual alien since, as the Court of Appeals for the District of Columbia Circuit, in its decision of February 2, 1956, in *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45, points out:

> It is important to bear in mind that when the Attorney General does exercise his discretion in favor of an alien who is here illegally this reduces by such admission the immigration quota of that alien's nationality and might very well result in exclusion of an alien who wished to come here legally, with the intention of making this his permanent home and establishing here close family ties and of fixing permanent roots in the United States.

This over-all political effect of allowance of aliens to remain in the United States by suspension of deportation brings into sharp focus the language of Mr. Justice Cardozo, speaking for this Court in *Norwegian Nitrogen Co.*, 288 U. S. at 319, with respect to an investigation by the Tariff Commission:

> * * * [W]ithin the meaning of this act the "hearing" assured to one affected by a change of [import] duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. * * *.

In *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, this Court denied court review in the case of orders of the Civil Aeronautics Board that were subject to presidential approval, the Court employing language equally appropriate to the instant exercise of discretion (333 U. S. at 111):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if

> courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. [Citing decisions.] * * *

Also pertinent in this connection are decisions dealing with the discretionary determination that an alien may not be subjected to physical persecution in the country to which deported.[21] In *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 394–395 (C. A. 2),[22] the court said:

> * * * [W]e see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely

[21] The discretionary action was tested under Section 243 (h) of the 1952 Act, 66 Stat. 214, 8 U. S. C. 1253 (h), which provides: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

[22] See also 200 F. 2d 288, certiorari denied, 345 U. S. 928.

> on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney General to use whatever information he has. To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose. Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude. As was said in Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 111, 68 S. Ct. 431, 436, 92 L. Ed. 568: "But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial".

See also *Namkung* v. *Boyd*, 226 F. 2d 385, 388–389 (C. A. 9).

As against the foregoing refusals of the courts to limit the information relied upon when discretionary administrative decisions are involved, the district court cases upon which petitioner relies have little authority. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.), and *Maeztu* v.

Brownell, 132 F. Supp. 751 (D. D. C.), to which may be added *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. D. C.), and *Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (N. D. Cal.). These decisions arose under the former regulations, which did not contain the present specific authorization (*supra*, p. 3) for use of confidential information, and turned primarily on a finding that the regulations then in effect made mandatory a quasi-judicial procedure for which all evidence must be of record.[23]

With the issuance of the new regulations specifically authorizing the use of confidential information, the only foundation for applying that reasoning to the instant case is swept aside. Furthermore, even upon the basis of the former regulations, these district court decisions are contrary to (a) the holding of the Court of Appeals for the Second Circuit in *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160, certiorari denied, 347 U. S. 967 (*supra*, pp. 26–27), and (b) the Attorney General's interpretation of his own regulations. Finally, they are basically inconsistent with the reasoning of the decisions, discussed

[23] It is to be noted that the dissenting view in *Shaughnessy* v. *Accardi*, 349 U. S. 280, 289, in criticizing the use of information not of record before the Board of Immigration Appeals, also did so upon an assumption that a hearing was required under the regulations then in effect, from which hearing requirement, in turn, the requirement of record evidence was derived. Under the present regulations this requirement is expressly negated (*supra*, p. 3).

above at pages 18–23; 26–28, 30–35, relating to the scope of review of discretionary decisions.[23a] The authority to recommend what is in essence a pardon ought not to be changed from a permission to act at discretion into a mandate forcing the recommending of the pardon whenever information derogatory to the alien is within the confidential area necessarily characteristic of much executive international and security source material.

3. The argument advanced by *Amicus Curiae* (Am. Cur. Br. 17–19), based upon a negative implication drawn from Section 235 (c) of the 1952 Act,[24] wholly ignores the controlling distinction between the two sections. Section 235 (c) deals with a factual determination of statutory qualifications involving a matter of right or status accorded by Congress to aliens wishing to enter this country. On the other hand, Section 244, the provision here involved, provides for an exercise of grace or clemency (*supra,* pp. 13–17).

[23a] At the time that these District Court cases arose there was no substantial practical occasion for appeal by the Government since the new regulations were imminent or had become effective (see Government Brief in Opposition in *United States ex rel. Matranga* v. *Mackey*, O. T. 1953, No. 663, p. 9).

[24] Section 235 (c), 66 Stat. 199, 8 U. S. C. 1225 (c), provides: "Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraph (27), (28), or (29) of section 212 (a) shall be temporarily excluded, and no fur-

For contested fact determinations bearing on matters of right, an adequate hearing and record evidence is the norm in the field of immigration, and can only be departed from in the very few kinds of cases (such as those involving exclusion of aliens) which are not governed by the Constitutional requirements of due process. In the absence of a specific Congressional mandate to the contrary, a purpose to require an adequate hearing for such a determination would be a matter of normal implication. However, since resort to confidential information is customary in connection with the exercise of discretionary powers in the nature of grace or clemency, including suspension cases, the normal implication to be drawn from the wording and purpose of Section 244 is that the dispensing authority may consider such

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ther inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman."

evidence. If the congressional policy had been otherwise, mandatory words requiring a hearing would have almost certainly been used. This normal implication is further reinforced by the reasoning and authorities already discussed and by the extensive legislative history (*infra*, pp. 39–49).

C. THE LEGISLATIVE HISTORY CONFIRMS THE BROAD SCOPE OF THE STATUTORY LANGUAGE AND PURPOSE

1. The instant statutory provision was modified and reenacted in the Immigration and Nationality Act of 1952 upon a basis of congressional reports and debates which confirm what is implicit in the legislative history, namely, that the provision vests in the Attorney General unusually broad discretionary power, akin to a judge's power to suspend sentence or a chief executive's power to commute or pardon. The only limitations imposed by the 1952 Act show a strong purpose to restrict the granting of suspension to cases of very unusual hardship. Where the alien was deportable, for reasons prescribed by Congress, suspension was to be the exception, not the rule. Congress thus provided stringent minimum requirements for eligibility to prevent any undue erosion of the normal statutory policy for deportation or disruption to an orderly and fair administration of the congressionally established quota system.

Thus, the Senate Committee report accompanying the 1952 Act[25] stated:

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very

[25] S. Rep. No. 1137, 82d Cong., 2d Sess., p. 25.

limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

A further indication of the stringent congressional policy as regards suspension is found in the circumstance that Congress insisted on reserving for itself a specific review of every case in which suspension was granted by the Attorney General, but made no such reservation when suspension was denied. It is thus apparent that Congress, recognizing the broad sweep of the Attorney General's power, was making certain that the suspension power could not be utilized to nullify the carefully spelled out provisions of the Act relating to deportation.

2. Unlimited discretion has always been available in the form of a congressional special bill for the benefit of an individual alien. However, as early as 1934 and 1935, an administrative approach was recommended in the form of legislation similar to that ultimately enacted in 1940 and reenacted in 1952, providing for voluntary departure and suspension of deportation in certain cases. S. Rep. No. 1515, 81st Cong., 2d Sess., 595–596; 78 Cong. Rec. 11789.[20]

[20] The obvious problems in relying upon a special bill for each alien to be extended clemency are well illustrated in

The analogy to executive clemency as regards criminal sentences, and the consequent breadth of the discretion, were recognized with respect to the earlier as well as later drafts of legislation. Thus, the early H. Rep. 1772, 73d Cong., 2d Sess. (May 24, 1934), p. 3, states:

> It will be observed that *even if the alien qualifies* under one of the six classes enumerated *favorable action is left to the discretion of the Secretary of Labor* [then in charge of these matters] * * *. [Emphasis added.]

Proponents and opponents of the early legislation referred to the procedure as "clemency" (81 Cong. Rec. 5546, 5569–5570), "leniency" (81 Cong. Rec. 4653–4654), "amnesty" (81 Cong. Rec. 5553, 5561, 5572), and compared it with "discretion in the President" (81 Cong. Rec. 5554). Also indicative of legislative purpose was the elimination from the 1940 drafts of language which had referred to the determination as one to be made upon a "quasi judicial" basis.[27]

As enacted in 1940 and 1948, the suspension provision[28] was not as emphatic as it is in the 1952 Act, since the former did not employ the

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the testimony of the Commissioner of Immigration and Naturalization in 1935 (79 Cong. Rec. 14573–14574).

[27] *Hearing before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess., on H. R. 5138, pp. 4, 28; S. Rep. No. 1796, 76th Cong., 3d Sess., pp. 2–3, 5; H. Rep. No. 2683, 76th Cong., 3d Sess., p. 3.

[28] Section 19 (c) of the amended 1917 Act. (See fn. 14, *supra*, p. 18.)

words "in his discretion." These words were added in the later enactment.

In 1947, when a congressional committee was considering proposed amendments to the suspension statute, the whole understanding of very broad discretion was openly laid before the committee by Mr. Shaughnessy, when he stated:[29]

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.
>
> * * * * *
>
> In vesting any discretionary power in these administrative folks, we realize that we are passing a law for all time, or at least for a long time in the future, and that there will be various personalities occupy that high position of Attorney General; but that is a gamble you have to make. There is nothing unusual about that.

Similarly, Attorney General Clark testified to a pattern in the exercise of the discretion which of necessity precluded a disclosure of the sources upon which that pattern was carried out:[30]

> * * * I think you know me well enough to know that I am going to administer it in the way justice warrants in the case, for the best interests of the United States.

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[29] Hearings before the Subcommittee on Immigration and Naturalization of the House Judiciary Committee, 80th Cong., 1st Sess., on H. R. 245, H. R. 674, H. R. 1115, and H. R. 2933 (1947), pp. 35, 40.

[30] *Ibid.* at pp. 132–133.

These are the interests that I am going to see protected. If there is a doubt, I am going to resolve the doubt in favor of the United States, just as I have done in the past in reference to subversive matters. I have never permitted anyone, so far as I know, to enter the United States in the regular immigration channels, outside of diplomatic channels, that has belonged to the Communist Party, for example, since I have been Attorney General, and I don't intend to do that in the future.

Whenever in the United States an alien is found to belong to such an organization, we have immediately tried to bring about deportation. We can continue to do that.

* * * * *

You would not be depleting the quota from those countries to any material extent if this bill were passed in its present form. At the same time, sir, you do not know what you are getting when those persons come in. I do know what I have got when I put an O. K. on someone who is here now. You can bet we have looked into his background and conduct pretty closely.

In its study of the laws preparatory to the 1952 revision the Senate Judiciary Committee stated (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the formal eligibility re-

> quirements does not necessitate a conclusion that he will be granted suspension of deportation. Where, by reason of specific unfavorable factors in the case the alien, in the opinion of the Commissioner, does not establish that he is entitled to the discretionary relief described in the law, the Commissioner frequently exercises his authority in denying the relief.

In the discussion of procedure the report noted that the investigator, who must "obtain, from persons having knowledge thereof, information concerning the alien's employment and earnings, his social activities, his home life, whether he has a record with the police in his place of residence in the preceding 5 years, whether he has been a recipient of public or private charity in the preceding 5 years, whether he appears loyal to the United States, and other pertinent facts that the course of the investigation may suggest * * *"

> is not required to take statements concerning such facts in writing or under oath. [*Id.* 598.]

The 1952 reenactment, moreover, must be viewed in the light of the then current interpretations by the courts that were a matter of public record with respect to the earlier enactment. The leading case of *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (C. A. 2) had been handed down two years before, in February 1950, holding that the provision for suspension created

a discretion the factual basis for which was not required to be the subject of outside evaluation or disclosure. Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (noted [31] in the congressional debates).[32]

Further significance appears from the deliberate aim of strengthening the completely discretionary nature of the suspension power, which was carried out by injecting the repetitive, emphatic language—"in his discretion"—after the words "the Attorney General may". This emanated from the typewritten analysis of the draft legislation (S. 3455, 81st Cong., 2d Sess., Apr. 20, 1950) prepared for the assistance of the congressional committees by the Immigration and Naturalization Service, an analysis specifically noted as having been considered by the committees (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 3; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 28; 98 Cong. Rec. 5089).[33] It was there suggested that (pp. 244–11, 244–14):

> [I]n order to indicate clearly that the grant of suspension is entirely discretion-

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[31] 98 Cong. Rec. 5154, 5178.

[32] Against this authoritative background, Congress clearly could not assume that its enactment would preclude use of confidential information merely because protest had been made by the District Court in the *Alexiou* case (*supra*, pp. 35–36), largely upon an interpretation of regulations which the Government could and did clarify.

[33] This analysis was cited in *United States* v. *Menasche*, 348 U. S. 528, 534, and is presently lodged with the Librarian of this Court for use in connection with the instant case.

> ary, there be inserted on line 7, page 107, after the word "may" the language "in his discretion." * * *
>
> * * * * * *
>
> For the same reasons indicated above it is suggested that on line 8, page 108 [Sec. 244 (c) of the instant legislation] after the word "may" there be inserted "in his discretion."[34]

The change appears again in H. Rep. No. 1365, 82d Cong., 2d Sess., p. 191, where the provisions of the earlier law and proposed law are placed side by side.

The more recent legislative history is thus consistent with the entire trend of this legislation, which, in turn, shows a purpose to establish a wholly discretionary authority in the nature of pure clemency or pardon, a type of proceeding in which confidential information has historically been considered.[35]

3. In the face of the prior history and practice, Congress in its reenactment of 1952 must be assumed to have contemplated continued reliance on sources of information which could not in many instances be appropriately disclosed. The

[34] The suggested additional language was incorporated in the next draft (S. 716, 82d Cong., 1st Sess., Jan. 29, 1951, Sec. 244 (a) and (c)).

[35] Attempts to change the grounds of suspension from discretionary grant to fixed legislation were made and rejected, but the proposals to eliminate discretion were not rested upon objection to the breadth of sources of information (98 Cong. Rec. 4433, 4436, 5179).

failure to provide for a hearing or to require the disclosure of all information considered cannot be attributed to inadvertence, for in the debates the breadth and effect of numerous other provisions for administrative discretion were vigorously discussed by opponents and proponents of the Act. It may not be assumed that the Congress, in reenacting the measure, was unaware of the issues involved in the conferring of a broad discretion (*e. g.*, 98 Cong. Rec. 5114, 5154–5155, 5213, 5316, 5421, 5622, 5625–5626, 5787–5788). The failure of the Congress specifically to provide what petitioner now claims was intended is accordingly within the scope of Mr. Justice Cardozo's observation in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. at 313:

> Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years. In this instance the inference is strengthened when it is recalled that during some of those years the Commission was under fire. * * *

In sum, the legislative history suggests a very strong congressional purpose to confer upon the Attorney General a power in the nature of a pardoning power; a satisfaction with the actual practice under the system it had established; and no purpose to restrict the Attorney General as to the type of information which he could consider in exercise of the power.

D. THE REGULATION, WHICH LIMITS THE USE OF CONFIDENTIAL INFORMATION TO INSTANCES WHERE DISCLOSURE "WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST, SAFETY, OR SECURITY", IS REASONABLE AND IN FULL ACCORD WITH THE STATUTE

The regulation, the validity of which is here in issue, is 8 C. F. R. (1952 ed.) 244.3. It provides:

> § 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

This regulation does not permit an unlimited use of undisclosed confidential information. The Attorney General has not authorized its use in making determinations as to the applicant's statutory eligibility for relief. Its use is permitted only in determining whether discretion should be exercised, and, even then, only when "the disclosure of such information would be prejudicial to the public interest, safety, or security". These

limitations lend further support to the reasonableness and validity of the regulation.[36]

For the reasons already discussed, this regulation is in full accord with the manifested purposes of Section 244 of the 1952 Act. Petitioner's challenge, directed at the Attorney General's alleged lack of authority to provide for such limited use of confidential information must fail.

II. THE HEARING OFFICER AND THE BOARD OF IMMIGRATION APPEALS PROPERLY COMPLIED WITH ALL APPLICABLE REGULATIONS

While the main thrust of petitioner's attack is directed at the claimed invalidity of Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 49) (Pet. Br. 8–22; Am. Cur. Br. 6–21), he makes the alternative contention that the applicable regulations were not properly complied with (Pet. Br. 7, incorporating Am. Cur. Br. 21–29). Two alleged instances of non-compliance are advanced. Petitioner argues that the regulations provide, by implication, (1) that the applicant for suspension be furnished with a "fair résumé" of

[36] In actual practice, this regulation is invoked, and suspension decisions are predicated upon undisclosed confidential information, in but a relatively small number of cases. We are informed by the Chairman of the Board of Immigration Appeals that an estimated less than five percent of the suspension cases which are appealed to the Board involve confidential information. The Board has the same access to the confidential information as did the special inquiry officer, and affirms or reverses the official determination following its review of both record and non-record information.

the confidential information (Am. Cur. Br. 21–27) and (2) that the special inquiry officer must disclose in his opinion both the nature of the confidential information and the manner in which it affected his judgment (Am. Cur. Br. 27–29).

These contentions are without merit. They are directly refuted by the wording and context of the applicable regulations, the controlling language of which is that the exercise of discretion "may be predicated upon confidential information *without the disclosure thereof to the applicant*" (emphasis added). 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 49). Furthermore, no court has construed these regulations as having the meaning which petitioner urges, and the decisions relied on (Am. Cur. Br. 23–27) do not sustain his attempt to avoid the plain meaning and policy of the regulations in issue.

1. Petitioner and *Amicus Curiae* concede (Pet. Br. 7, incorporating Am. Cur. Br. 25) that "there is no rule of law requiring a hearing and the taking of evidence" before making a decision involving an exercise of executive clemency or the imposition or suspension of a criminal sentence. However, they ask this Court (Am. Cur. Br. 21–27) to negate the plain meaning of the words "without the disclosure thereof" used in the controlling regulation applicable to the exercise of discretion, suggesting the existence of inconsistency between the language of 8 C. F. R. (1952 ed.)

244.3 and that of 8 C. F. R. (1952 ed.) 242.53 (c), 242.54 (d) and 242.61 (a) (App. B, *infra*, pp. 58–61). The former specifically authorizes the use of undisclosed confidential information in reaching a decision on whether or not to grant the discretionary relief, while the latter provides for the use of evidence pertinent to the applicant's statutory "eligibility" for discretionary relief.

Petitioner and *Amicus Curiae* contend that since the Attorney General provided for a hearing as to certain aspects of the suspension proceedings, he never meant the language of Section 244.3 to provide for complete nondisclosure of the confidential information, in spite of his use of the words "without the disclosure thereof to the applicant." What the Attorney General really intended, petitioner urges, was that each applicant be provided with a "résumé [which] should be detailed and should reveal the source and nature of the accusation" (Am. Cur. Br. 26).

In advancing this contention petitioner totally overlooks that the allegedly inconsistent regulations were promulgated the same day (December 17, 1952, 17 F. R. 11469, 11514, 11515, 11517). He further fails to note the distinction between a determination of a matter of statutory eligibility and a determination of clemency once eligibility is established. As to the latter, the Attorney General saw fit to provide for a hearing in the usual

sense except with respect to matters of a confidential nature the disclosure of which would be prejudicial to the public interest, safety, or security.

The cases cited in support of petitioner's argument are not only completely distinguishable but are not even analogous. The first *Accardi* case, 347 U. S. 260, on which petitioner places his principal reliance (Am. Cur. Br. 25), holds only that an applicant is entitled to be accorded whatever benefits the regulations in fact provide. Furthermore, Accardi's suspension application had been made pursuant to the earlier regulations, applicable to the pre-1952 suspension statute, which made no specific provision for the use of confidential information. Nor do the cited selective service cases (Am. Cur. Br. 26) provide authority for interpreting the explicit language of the regulations here in issue in a way directly at variance with their plain meaning. Those cases dealt with a statute which specified the Department of Justice "shall hold a hearing" to determine a matter of statutory right; it was held that in this posture a "fair résumé of any adverse evidence" was an essential ingredient. See *United States* v. *Nugent*, 346 U. S. 1, 3, 6, and *Simmons* v. *United States*, 348 U. S. 397, 403.

2. Petitioner's final contention is that the hearing officer was required by Section 242.61 (a) of the regulations (App. B, *infra*, pp. 60–61) to "dis-

cuss the nature of the derogatory accusations and then recite how and why such information has affected his judgment" (Am. Cur. Br. 28).

Section 242.61 provides that the hearing officer's "decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application". As regards petitioner's statutory eligibility for suspension, the special inquiry officer found in petitioner's favor, following an appropriate review of the evidence. However, he held against petitioner on the issue of whether discretionary relief should be granted, stating his reason as follows (R. 48):

> * * * after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied.

This statement of his reason is all that the rule required in view of the express mandate of Section 244.3 that when the determination is predicated upon "confidential information * * * the disclosure of [which] would be prejudicial to the public interest, safety, or security" it is to be made "without the disclosure thereof to the applicant".

This determination was reviewed by the Board of Immigration Appeals, which reviewed both

the record evidence and the undisclosed confidential information and concluded (R. 51):

> Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APRIL 1956.

APPENDIX A: STATUTE INVOLVED

1. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214-216, 8 U. S. C. 1254 (a) (5) and 1254 (c), are the statutory provisions governing the suspension of petitioner's deportation. They provide, in pertinent part:

> SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence;

* * * * *

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

Sections 244 (a) (1) (2) (3) and (4) provide for suspension for other categories of aliens and are not pertinent to the instant case. Section 244 (b), 8 U. S. C. 1254 (b), governs suspension for aliens meeting the requirements of subsections 244 (a) (1) (2) and (3). It differs from Section 244 (c) in that the administrative action suspending deportation becomes final when Congress does not take affirmative action to the contrary.

2. Section 244 (d) of the Immigration and Nationality Act of 1952, 66 Stat. at 216, 8 U. S. C. 1254 (d), provides:

> SEC. 244 * * *
>
> (d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

APPENDIX B: REGULATIONS INVOLVED

The following regulations were those under which petitioner's application for suspension of deportation was considered. They were all promulgated on the same day, December 17, 1952, 17 F. R. 11469, 11514, 11515, 11517. The regulations

which comprise 8 C. F. R. (1952 ed.) Part 242—*i. e.* Sections 242.53 (c), 242.54 (d) and 242.61 (a)—were revised and renumbered in January 1956, 21 F. R. 97, 100. The revised regulations are not involved in the instant case.

1. 8 C. F. R. (1952 ed.) 242.53 (c),[1] 17 F. R. 11514, provides, in pertinent part:

> § 242.53 *Conduct of hearing*— * * *
>
> (c) *Special inquiry officers; specific duties.* * * * the special inquiry officer shall * * * (5) present the evidence, including the interrogation, examination, and cross-examination of the respondent and witnesses to the extent necessary, as to (i) alienage, (ii) date, place and manner of entry of the respondent into the United States, (iii) grounds for deportation, (iv) factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made, and (v) such other matter as may be pertinent to the issues in the case. * * * the special inquiry officer, in such cases and at such time during the hearing as he deems appropriate, may advise the respondent concerning application for the privilege of suspension of deportation or voluntary departure under the provisions of section 244 of the said Act, * * *

2. 8 C. F. R. (1952 ed.) 242.54 (d),[2] 17 F. R. 11515, provides, in pertinent part:

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[1] A 1953 amendment, (18 F. R. 4926) did not relate to the quoted matter. The subject matter of Section 242.53 (c) is now covered by Sections 242.8 (a) and 242.16 (a) of the revised regulations (21 F. R. 100).

[2] This section was amended in 1955 (20 F. R. 3495) in certain respects not here relevant. The subject matter of

§ 242.54 *Contents of records; evidence.*
* * *

(d) *Application for discretionary relief.* * * * at any time during the hearing the respondent may apply for suspension of deportation on Form I–256A or for voluntary departure, under section 244 of the said Act. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

3. 8 C. F. R. (1952 ed.) 242.61 (a),[8] 17 F. R. 11515, provides, in pertinent part:

§ 242.61 *Decision of special inquiry officer*—(a) *Preparation of written decision.* Except as provided in paragraph (b) of this section and § 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, unless such findings and conclusions are waived by the respondent orally during the hearing or by written waiver filed with the special inquiry officer after the conclusion of the hearing. If the respondent has applied for discretionary relief in accordance with

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Section 242.54 (d) is now covered by Section 242.16 (e) of the revised regulations (21 F. R. 100). Also cf. Sections 242.14 (a) and 242.14 (b) of the revised regulations (*ibid.*).

[8] The subject matter of Section 242.61 (a) is now covered by Section 242.17 (a) of the revised regulations (21 F. R. 100).

the provisions of § 242.54 (d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. * * *

4. 8 C. F. R. (1952 ed.) 244.3; 17 F. R. 11517, provides:

§ 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

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